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No. 94-876

In The

Supreme Court of the United States

October Term, 1994

MICHAEL LENNON, JOHN WILLETT
and TIMOTHY HETTRICH,

Petitioners,

vs.

JULIA ALEXANDER, AS EXECUTOR OF THE ESTATE
OF HENRY O. QUADE, JR., DECEASED,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

Respondent Julia Alexander argues that the opinion of the Ninth Circuit does not raise the questions presented in the Petition For Certiorari ("Petition"). Alexander also asserts that the decision does not conflict with the holdings of other circuits. Ironically, Alexander's arguments strengthen the case for certiorari.

ARGUMENT

A. THE NINTH CIRCUIT'S DECISION RAISES THE QUESTION OF EXCESSIVE FORCE PRESENTED IN THE PETITION.

Alexander offers three reasons this case does not raise the first question presented in the Petition.[1] None succeeds.

First, Alexander asserts that the opinion below "does not purport to impose liability upon the officers who shot Quade," but only upon "the commanding officers who unreasonably ordered a Swat team to storm the house. . . . " Respondent's Brief, pp. 6-7. Of course, the ultimate liability in this case is not for "storming" Quade's house, but for *shooting* him. The Ninth Circuit accepts Alexander's theory for that liability, raising the question presented by Petitioners:

> It is important to understand exactly what plaintiff claims. She argues that it was unreasonable for *the officers* to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered. Plaintiff does not argue that once Quade pointed his gun at the officers and pulled the trigger, the officers used unreasonable force in shooting to kill. Rather, plaintiff argues that *defendants used unreasonable force in*

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[1] The first question presented is:

> Are police officers liable under 42 U.S.C. §1983 for shooting a person in self-defense, where the liability is premised solely on a claim that the police "created the situation" in which the person tried to shoot them?

> *creating the situation which caused Quade to take the actions he did. . . .* [¶] *Plaintiff's claim,* if supported by the evidence, *states a classic Fourth Amendment violation* under *Graham v. Connor,* 490 U.S. 386, 397 (1989).

29 F.3d at 1366, Petition, pp. A-27-28 (emphasis added, footnote omitted).

Thus, the theory of liability here is that by "storming" the house, the police led Quade to point a gun at them, resulting in his death. Significantly, in referring to "the officers" who "storm[ed] the house," the opinion does not distinguish between line officers and commanders.[2] The *holding* of the case is that police officers – commanders or troops – may be liable under §1983 for the shooting of a person in self-defense, where the liability is premised on the claim that the officers "created the situation" that led the person to attack them. The question presented is the correctness of this holding.

Critically, Alexander's focus on the command to "storm" Quade's house concedes the central point of the Petition: The Ninth Circuit has permitted liability to be premised upon force used *before the seizure.* But the proper standard is "reasonableness *at the moment*" the seizure occurs. *Greenidge v. Ruffin,* 927 F.2d 789, 791-92 (4th Cir. 1991), *quoting Graham v. Connor,* 490 U.S. 386, 396 (1989) (emphasis added in *Greenidge*). The Ninth Circuit's

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[2] And for good reason. Alexander sued both. While she later dismissed the line officers, the rule of law as to commanders and troops is the same. So is San Francisco's duty to indemnify either kind of officer for liability incurred in the course of their duties. *See* Cal. Gov't. Code §825.

holding here conflicts with *Greenidge* and with decisions from six other Courts of Appeals. *See* Petition, pp. 10-12.

Alexander's second argument is that the Petition ignores the link between the claim of excessive force and the claim of unlawful entry under *Payton v. New York*, 445 U.S. 573 (1980). Respondent's Brief, pp. 7-8. In support, Alexander quotes Judge Kozinski's concurring opinion:

> I would like to believe that, had *Payton* been followed, the judicial officer from whom the warrant was sought would have injected a measure of objectivity and detachment, perhaps saving Quade's life.

29 F.3d at 1369 (Kozinski, J., conc.), Petition, p. A-34.

Significantly, however, the *majority* opinion does not premise the officers' liability for excessive force on the failure to obtain an arrest warrant. Indeed, the majority's theory is quite the opposite. Judge Fletcher suggests that if the officers entered the house intending to *arrest* Quade – the only basis for finding a *Payton* violation – there should be *no* liability for excessive force. 29 F.3d at 1367, Petition, p. A-29.[3]

In addition, the link between the failure to seek an arrest warrant and Quade's death is tenuous at best. Given that Sgt. Heller witnessed Quade threaten the police with a gun, it is inconceivable that a magistrate would have refused to issue a warrant to arrest. The

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[3] Notably, Alexander does not even address Petitioner's argument that by permitting liability to turn on the subjective intent of the police, the opinion conflicts with *Graham v. Connor*. *See* Petition, pp. 12-15.

alleged *Payton* violation is a thin reed on which to rest Alexander's claim of excessive force.

Finally, Alexander says that her claim is not premised on the argument that the police "created the situation" resulting in Quade's death, but rather is premised on the argument that "the police actions that created the situation were *themselves* unreasonable. . . . " Respondent's Brief, p. 9 (emphasis in original). This is sophistry. The opinion says that "a classic Fourth Amendment violation" is stated by a claim that the police "creat[ed] the situation which caused Quade to take the actions he did." 29 F.3d at 1366, Petition, pp. A-27-28 (emphasis added, footnote omitted). Alexander cannot seriously be contending that she is seeking to recover for Quade's having been led to point a gun at police, but not for what happened next.

B. THE NINTH CIRCUIT'S DECISION RAISES THE QUESTION OF UNLAWFUL ENTRY PRESENTED IN THE PETITION.

Alexander asserts that review of the lawfulness of the entry into Quade's house is inappropriate because as framed, the question suggests that the entry was based upon exigent circumstances.[4] Citing footnote 11 of the

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[4] The third question presented is:

> Where police officers are in the course of executing a forcible entry warrant, does the Fourth Amendment require the officers to stop and obtain an arrest warrant once the officers have determined to arrest the occupant because he threatened to shoot them?

Ninth Circuit's opinion, Alexander says that this suggestion is without support. Footnote 11 emphasizes (1) that Captain Hettrich told the press after the shooting that the situation was not "necessarily" dangerous and (2) that the police had set up a perimeter around the house to protect bystanders. 29 F.3d at 1365 n.11, Petition, p. A-25.

Neither of these facts establish legally that a situation is not exigent where a mentally unstable person has threatened "to get his gun and use it" and where the person refuses to respond to police negotiators. In any event, the reasons for review of this issue do not turn upon exigent circumstances. Instead, the reasons turn on (1) the existence of a forcible entry warrant and (2) an officer's having heard Quade threaten to shoot the police. *See* Petition, pp. 17-19. Alexander addresses neither point.[5]

C. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

Alexander offers two ways to distinguish the cases from other Courts of Appeals that refuse to hold police officers liable under §1983 for "creating the situation" that leads to a use of deadly force. Neither distinction works.

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[5] Alexander also asserts that the Petition's second and fourth questions are unworthy of review. Respondent's Brief, pp. 10-11, 13-14. Both questions concern claims of qualified immunity. Again, Respondent's Brief fails to confront the reasons Petitioners advance for granting certiorari on these questions. *See* Petition, pp. 16-17, 19-20.

First, Alexander claims that the other cases are different because none "involved an on-going constitutional violation that contributed directly to the excessive force claim." Respondent's Brief, p. 14. As discussed above, however, rather than finding that a *Payton* violation *contributed* to the excessive force claim, the opinion here suggests that the alleged *Payton* violation and the excessive force claim are *mutually exclusive*. *See supra* p. 4.

Second, Alexander argues that the cases from other Courts of Appeals are distinguishable because they involve exigent circumstances. Even assuming *arguendo* that this case involves no such exigency, Alexander cannot distinguish the cases from other circuits so easily. For example, in *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992), the suspect was shot after an intricate plan devised by the police aborted. *See* Petition, p. 10. There was no exigency at the time the plan was devised. Nonetheless, the Seventh Circuit rejected the theory that the police had "provoked a situation whereby unreasonably deadly force was used." 973 F.2d at 1330.[6]

Finally, Alexander contends that "[t]he seizure in the case at bench was inextricably bound up with the command decision to storm Mr. Quade's home with a tactical team." Respondent's Brief, p. 15. Of course, the same could be said of the seizure and the pre-seizure conduct in virtually all of the cases from other circuits cited in the Petition. In *Carter*, for example, the seizure was "inextricably bound up with the command decision" to use a

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[6] In *Carter*, the circumstances were exigent once the plan aborted and the suspect drew a gun on police. The same is true here.

ploy to arrest the suspect. Yet the Seventh Circuit ruled that "[s]hooting [the suspect], then, constitutes the only 'seizure' we must scrutinize under the Fourth Amendment." *Id.* at 1333. The Ninth Circuit's decision here conflicts with *Carter* and the decisions of every other Court of Appeals to face an "Alexander" claim.

CONCLUSION

Alexander concedes that the Ninth Circuit has permitted liability under §1983 for a use of excessive force before any seizure occurs. She also concedes that the opinion below permits a claim of excessive force to turn on the subjective intent of police officers. Alexander's concessions confirm that the Ninth Circuit's decision conflicts with the decisions of other circuits and of this Court.

The issues in this case are important. Left unreviewed, the Ninth Circuit's opinion will open federal courts to a new class of claims and will place police officers facing armed resistance in untenable positions. Certiorari should be granted.

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Respectfully submitted,

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